

**STATEMENT OF**

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**BEFORE THE  
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT  
OF THE  
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE  
U.S. HOUSE OF REPRESENTATIVES**

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Good morning Mr. Chairman and Members of the Subcommittee. We welcome this opportunity to speak to you about Clean Water Act (CWA) jurisdictional issues and practices. As part of responding to your March 9, 2004 letter of invitation, our testimony also will provide background information on the roles and responsibilities of the Army Corps of Engineers (Corps) and Environmental Protection Agency (EPA) under section 404 of the CWA, address the current regulatory and legal status of federal jurisdiction in light of the issues raised by the Supreme Court ruling in Solid Waste Agency of Northern Cook County v. the U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (SWANCC), briefly summarize the most recent Army and EPA guidance on CWA jurisdiction – including the regulation of wetlands and other waters, and address the steps

the two agencies are undertaking to enhance consistency of CWA jurisdictional determinations.

### **Overview of the CWA Section 404 Program and the SWANCC Decision**

A primary goal of the CWA is to restore and maintain the physical, chemical, and biological integrity of the Nation's waters, including wetlands, through programs such as section 404. Wetlands are among the Nation's most valuable and productive natural resources, providing a wide variety of functions. They help protect water quality, support commercially valuable fisheries, and provide primary habitat for wildlife, fish, and waterfowl. In the 32 years since its enactment, the CWA section 404 program – together with Swampbuster, ongoing public and private wetlands restoration programs, and active State, Tribal, local, and private protection efforts – has helped to prevent the destruction of hundreds of thousands of acres of wetlands and the degradation of thousands of miles of rivers and streams. The annual rate of wetland loss, from development as well as subsidence and other natural causes, is estimated to have been reduced from 460,000 acres per year during the 1950s to 60,000 acres annually between 1986 and 1997. Since 1990, the federal government has endorsed a no net loss of wetlands policy and this policy remains in force. In terms of the section 404 program, this goal is being accomplished through avoidance, minimization, and compensation for

unavoidable impacts to aquatic resources. Protection of wetlands has reduced downstream flooding, and protected fish and wildlife habitat and water quality.

The Corps and EPA coordinate to administer the CWA section 404 regulatory program which covers discharges of dredged and fill material into waters of the United States, including wetlands. Under section 404 of the CWA, any person planning to discharge dredged or fill material into waters of the United States first must obtain authorization from the Corps (or a Tribe or State approved to administer the section 404 program) in the form of an individual permit or a general permit before undertaking that activity. In practice, the vast majority of projects (95% in 2003) are authorized under general permits, which require less paperwork by the project proponent than an individual permit application. The Corps is responsible for the day-to-day administration of the section 404 program, including reviewing permit applications and deciding whether to issue or deny permits. EPA's role under CWA section 404 includes coordinating with States or Tribes that choose to administer the section 404 program, interpreting statutory exemptions from the permitting requirement, and sharing enforcement responsibilities with the Corps. EPA also develops, in consultation with the Corps, the section 404(b)(1) Guidelines, which are the environmental criteria that the Corps applies when deciding whether to issue section 404 permits. Under these guidelines, a discharge is permissible only when there is no practicable alternative with less adverse effect on the aquatic

ecosystem, appropriate steps have been taken to minimize potential adverse effects to the aquatic ecosystem, and unavoidable impacts are mitigated.

EPA and the Corps have a long history of working together closely and cooperatively in order to fulfill our statutory duties. For example, in 1989, the agencies entered into a Memorandum of Agreement (MOA) allocating responsibilities between EPA and the Corps for determining the geographic jurisdiction of the section 404 program. The MOA recognizes that EPA will have the ultimate authority to determine the scope of geographic jurisdiction and the Corps performs the majority of the geographic jurisdictional determinations as an integral part of its permitting responsibilities.

In 2001, the Supreme Court rendered a decision in the Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC) case. This decision has affected the scope of federal jurisdiction under the CWA and the section 404 regulatory program. SWANCC involved a challenge to Clean Water Act jurisdiction over certain isolated, intrastate, non-navigable ponds in Illinois that were part of an abandoned sand and gravel mining operation, but which, over time functioned as habitat for migratory birds.

In SWANCC, the Supreme Court held that the Corps had exceeded its authority in asserting CWA jurisdiction pursuant to section 404(a) over isolated, intrastate, non-navigable waters under 33 CFR Part 328.3(a)(3), based solely on their use as habitat for migratory birds pursuant to the so-called "Migratory Bird

Rule," 51 Fed. Reg. 41217 (1986). At the same time, the Court in SWANCC did not disturb its earlier holding in United States v. Riverside Bayview Homes, 474 U.S. 121 (1985), which found that the Congressional concern for the protection of water quality and aquatic ecosystems was evidence of its intent to regulate wetlands "inseparably bound up with" jurisdictional waters. 474 U.S. at 134.

Although the SWANCC decision did not expressly invalidate any part of the CWA or of the regulations (the so-called "Migratory Bird Rule" is not a regulation but is actually an excerpt from the preamble to the Corps 1986 rule), it does have important implications for the scope of waters protected by the section 404 program, as well as implications for other Clean Water Act programs whose jurisdiction depends upon the meaning of "navigable waters." The Corps' and EPA's interpretation of the scope of CWA geographic jurisdiction since SWANCC seeks to achieve the goals and objectives of all CWA programs, including section 404, while at the same time maintaining consistency with the Court's decision.

The Supreme Court's invalidation of the use of the "Migratory Bird Rule" as a sole basis for CWA jurisdiction over certain isolated waters has focused greater attention on CWA jurisdiction generally, and, specifically, over tributaries to jurisdictional waters and over wetlands that are "adjacent wetlands" for CWA purposes. This attention to tributary and adjacent status is largely due to the fact that the "Migratory Bird Rule" criteria were often applied in the field since

1986 as a basis for jurisdiction over aquatic areas; whether or not these areas were jurisdictional on some other basis (e.g., as adjacent wetlands) did not need to be addressed.

“Navigable waters” are defined in section 502 of the CWA to mean “waters of the United States, including territorial seas.” In SWANCC, the Court determined that the term “navigable” had some significance in indicating the authority Congress intended to exercise in asserting CWA jurisdiction. After reviewing the jurisdictional scope of the statutory definition of “navigable waters” in section 502, the Court concluded that neither the text of the statute nor its legislative history supported the Corps’ assertion of jurisdiction over the waters involved in SWANCC.

In SWANCC, the Supreme Court recognized that “Congress passed the Clean Water Act for the stated purpose of ‘restoring and maintaining the chemical, physical, and biological integrity of the Nation’s waters’” and noted that “Congress chose to ‘recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.’” Expressing “serious constitutional and federalism questions” raised by the Corps’ interpretation of the Clean Water Act, the Court stated that “where an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear statement from

Congress that it intended that result.” Finding “nothing approaching a clear statement from Congress that it intended CWA jurisdiction to reach an isolated sand and gravel pit,” the Court held that the “Migratory Bird Rule,” as applied to petitioners’ property, exceeded the Corps authority under section 404.

Since the SWANCC decisions, courts of appeal in five judicial circuits have addressed the scope of CWA jurisdiction. The 4th, 6th, 7th and 9th circuits have upheld jurisdiction over tributaries (including non-navigable tributaries) and adjacent wetlands, finding that the SWANCC decision does not affect the scope of CWA jurisdiction over such waters. Several of these decisions are currently the subject of petitions for certiorari pending before the U.S. Supreme Court. Two 5th Circuit decisions, although not squarely in conflict with the other Circuits, reasoned in non-binding discussion that SWANCC narrowed jurisdiction over tributaries to include waters that are actually navigable or waters adjacent to an open body of navigable water.

**Corps and EPA Activities to Improve Consistency, Transparency, Predictability, and Best Available Science in Section 404 Implementation**

Since SWANCC, the Corps and EPA have re-emphasized the need to ensure that the section 404 program is implemented with appropriate consistency, transparency, predictability, and the best available science. In January 2003, following coordination with the Department of Justice, the EPA

and Army General Counsels issued clarifying guidance regarding the Supreme Court's decision in SWANCC. The guidance recognizes that jurisdictional decisions will be based upon Supreme Court cases, including Riverside Bayview Homes and SWANCC, relevant regulations, and applicable case law in each jurisdiction. Because the January memorandum is internal guidance, it does not impose legally binding requirements on EPA, the Corps, or the regulated community. Moreover, its applicability depends on the specific facts of individual proposals. The guidance was provided to agency field offices and also published as Appendix A to the agencies' *Advance Notice of Proposed Rulemaking* (ANPRM), soliciting public comment, information and data on issues associated with the definition of "waters of the United States" (68 Fed. Reg. 1991, January 15, 2003). The guidance was distributed in this manner to ensure its availability to interested persons and to help better inform public comment.

The January 2003 guidance makes a number of key points with regard to assertion of Clean Water Act jurisdiction, providing that:

- Field staff should not assert jurisdiction over isolated wetlands and other isolated waters that are both intrastate and non-navigable where the sole basis for asserting jurisdiction is based on the following factors which were contained in the preamble language known as the "Migratory Bird Rule":
  - Use as habitat by birds subject to Migratory Bird Treaties or which cross State lines;
  - Use as habitat for endangered species; or
  - Use to irrigate crops sold in commerce.



- Field staff should continue to assert jurisdiction over traditional navigable waters (and adjacent wetlands) and, generally speaking, their tributary systems (and adjacent wetlands).
  - The guidance discusses the agencies' regulations which define traditional navigable waters as waters that are subject to the ebb and flow of the tide, or waters that are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.
- Field staff should seek formal project-specific headquarters concurrence prior to asserting jurisdiction over isolated, non-navigable, intrastate waters based on the following factors which are listed in 33 CFR section 328.3(a)(3):
  - Use by interstate or foreign travelers for recreation or other purposes;
  - Production of fish or shellfish sold in interstate or foreign commerce; or
  - Use for industrial purposes by industries in interstate commerce.

As mentioned earlier, the guidance was an appendix to an ANPRM intended to solicit public comment, information, and data on issues associated with the definition of "waters of the United States" in light of SWANCC.

Specifically, the ANPRM asked for comment on (1) whether "isolated waters" should be defined by regulation, and if so what factors should be considered, and (2) whether links to interstate commerce for isolated intrastate non-navigable waters provide a basis for CWA jurisdiction. Issuance of the ANPRM was an extra measure, not required by the Administrative Procedures Act, to provide an early opportunity for public comment on this important issue. As is often the case with ANPRMs, we did not seek to limit comment on the specific questions raised. The ANPRM did not pre-suppose any particular substantive or

procedural outcome. At the close of the public comment period on April 16, 2003, over 133,000 comments had been received, with the vast majority apparently the result of email or write-in campaigns, producing identical or substantially similar letters. Of the approximately 3,600 unique individual letters received, approximately 500 discuss specific issues in some level of detail. The commenting parties included a variety of stakeholder groups, such as: Tribes; States, and related associations; local governments; academia; research and scientific associations; industry and the regulated public; environmental groups and other non-profit organizations; and, private citizens.

The comments reflect a wide breadth of opinion, ranging from assertions that SWANCC affects only jurisdiction based solely on use by migratory birds that cross State lines to assertions that SWANCC limits CWA jurisdiction to navigable-in-fact waters and those tributaries and wetlands shown to have an actual effect on navigable capacity. Many commented on whether rulemaking was needed. Some commenters supported further rulemaking to clarify CWA jurisdiction, some favored clarification through the use of guidance instead, while others supported no action at all or withdrawal of the current guidance. Some commenters expressed the view that the nature and extent of aquatic resource impacts was irrelevant to determining CWA jurisdiction, while others expressed concern for such impacts and the need to consider this when determining how to proceed. Several emphasized the difficulty in developing a

scientifically defensible definition of “isolated waters” because the concept reflects legal concepts rather than natural systems. Others felt that workable definitions could be developed through rulemaking and lessen regulatory uncertainty. Many States and other commenters provided information and data regarding the ecological value of various aquatic resources, including wetlands and ephemeral and intermittent streams.

On December 16, 2003, EPA and the Corps announced that we would not issue a new rule on federal regulatory jurisdiction over isolated wetlands. At the same time, President Bush, EPA, and the Corps reiterated the Administration's commitment to the goal of “no net loss” of wetlands in the United States.

The Corps and EPA have undertaken a variety of actions to increase coordination on section 404 program implementation and jurisdictional determinations. For example, field and headquarters staff from both the Corps and EPA came together at a national wetlands program meeting in November 2003 to discuss scope and implementation of section 404. The meeting had representatives from all 38 Corps districts and all 10 EPA regions, as well as headquarters. Multiple joint action items resulted from that meeting, and the agencies plan to continue such interagency program meetings. Similarly, EPA, the Corps, and the Department of Justice held a conference in July 2003 which resulted in an ongoing dialogue among staff to increase interagency coordination.

EPA and Corps headquarters coordinate on requests from the field, in accordance with the January 2003 guidance, for formal approval of jurisdictional calls involving isolated intrastate, non-navigable waters based solely on commerce links other than those in the migratory bird rule. Furthermore, a number of EPA Regions and Corps districts currently coordinate on jurisdictional calls that raise challenging issues. EPA, Corps, and DOJ staff continue to have biweekly meetings to discuss jurisdictional issues and questions that arise in the field.

As EPA and the Corps jointly implement the Section 404 program, post-SWANCC, a variety of issues have arisen due to the differences in climate, geology, and geography throughout the country. The current regulations establish a framework that provides useful detail and consistency for applying best professional judgment on a case-by-case basis. We will seek to ensure that approaches and results are consistent for similar aquatic resources, and are legally defensible. Headquarters and field office staff will selectively conduct joint visits to sites that may involve complex jurisdictional determinations regarding the scope of the waters of the United States, in order to work towards a common understanding of jurisdictional issues and potential approaches. Visited sites would be illustrative of the hydrologic regime in the area, and would assess field conditions independent of any particular permitting actions.

The agencies also have agreed to coordinate and share jurisdictional data. The Corps routinely collects information on jurisdictional calls and has agreed to collect and share information on district jurisdictional calls with EPA and the general public, including findings of no-jurisdiction. The Corps and EPA also are coordinating to expand and improve the utility of the Corps' Operations and Maintenance Business Information Link (OMBIL) Regulatory Module (ORM), the permit-tracking database currently being installed in all Corps districts. ORM will provide the Corps with more detailed information on permit impacts and mitigation and will be linked to a Geographic Information System (GIS) in the near future to provide spatial data for all permits. These data will be made available to the public through the Corps website and updated daily. These will provide an excellent foundation for providing greater accessibility to information and help ensure consistency based on credible data.

The Corps initiated a project to make Corps data available for water quality and watershed managers by integrating it with other information systems. The objective is to enable geographically-referenced data on section 404 permits, compensatory mitigation, and compliance and enforcement actions to be evaluated along with data on water quality condition, impairment, and habitat in streams and other water bodies. This will facilitate the development and implementation of comprehensive watershed plans that

address issues such as wetlands and water quality. The resulting data also will be available to the local entities, States, and general public to assist with their watershed and land use planning efforts.

Corps and EPA staff are working together to explain to stakeholder groups the scope of CWA geographic jurisdiction in light of SWANCC. For example, EPA and Corps staff earlier this month spoke at a national meeting of the National Association of Counties (NACo), and at a widely attended meeting in Texas sponsored by the Texas General Lands Office.

The agencies also recognize the importance of State and Tribal roles in implementing the Clean Water Act, which was noted by the Supreme Court in the SWANCC decision. The Administration supports strengthening the federal/State/Tribal partnership in wetlands protection, and the President has requested a \$5 million increase in funding in Fiscal Year 2005 to fund State and Tribal wetlands programs, including those that address waters affected by SWANCC.

The agencies recognize that additional steps are needed to contribute to improved coordination and provision of information to the public and the regulated community, some of which were highlighted in the recent General Accounting Office (GAO) report.

The GAO Report Conclusions and Recommendations

The section 404 regulatory program continues to face legal and technical challenges as jurisdictional determinations are made in a post-SWANCC environment. The President has asked that the agencies continue their ongoing efforts to achieve regulatory clarity and predictability. The General Accounting Office Report, entitled "*Waters and Wetlands: Corps of Engineers Needs to Evaluate its District Office Practices in Determining Jurisdiction*," released in March 2004, focuses on implementation by the Corps of the section 404 program and geographic jurisdiction issues after SWANCC. The report makes several recommendations intended to increase predictability and openness of jurisdictional decisions, and the Corps and EPA are looking forward to working together to implement those recommendations, and other improvements.

The report emphasizes some of the challenges faced by Corps districts since SWANCC, and observes that conditions that could affect jurisdiction vary geographically across the country. The GAO report notes that current regulations are not so specific that Districts use the exact same practices when making jurisdictional calls in all areas of the country. As the GAO report observes, the existing regulations do not contain a definition of the term "tributaries", nor do they explain how "adjacency" is to be established for purposes of CWA jurisdiction. Regulations, by their very nature, set out a framework that is then interpreted and applied to various factual circumstances. This is particularly the case with regulations such as those

defining “waters of the U.S.,” which the CWA recognizes are to be applied to a wide variety of geographic and climactic situations.

In terms of the inconsistencies in CWA jurisdictional determinations noted by GAO, we would like to note that it is not surprising that some level of variation has been observed. The Corps makes more than 100,000 jurisdictional determinations annually. These determinations are spread across 38 Districts, and are made by some 1,200 regulators, who must exercise on the ground judgment in a wide variety of factual and ecological settings.

While the GAO report found some difference in Corps practices for making jurisdictional determinations, the report did not dispute the Corps' explanation that differences in climate, geology, geography, and other factors required some flexibility in the definitions used to make jurisdictional determinations, and that it would not be possible to achieve absolute nationwide consistency in making jurisdictional determinations. The GAO report did not identify differences in results among the selected Corps districts that it examined. Indeed, the report states that “whether or to what degree individual differences in Corps district office practices would result in different jurisdictional determinations in similar situations is unclear...” In the Corps response to the GAO report we pledged to undertake the recommended reviews and assessments with District personnel to determine if and how their respective



office practices might affect jurisdictional determinations. As a result of their observations, the GAO made three recommendations:

- (1) A survey of all district offices should be conducted to determine if significant differences exist in jurisdictional practices nationwide.
- (2) The Army, in coordination with EPA, should evaluate whether and how any differences in jurisdictional practices should be resolved.
- (3) Districts should document their jurisdictional practices and make this information available to the public.

The Corps and EPA agree with GAO's recommendations. The Corps will conduct a comprehensive survey in 2004 to assess District jurisdictional practices – and will use the information gained from this comprehensive survey to make an informed judgment about national jurisdictional practices and to determine, in coordination with EPA, what, if any, actions should be taken to promote greater consistency in CWA jurisdictional determinations nationwide. That judgment will of course take into account controlling legal precedents. Should we conclude that further action is required to promote national consistency, we will employ the appropriate procedural tools to communicate this information to regulatory personnel and the public. Our goal will be to build a comprehensive and accurate information base that will assist us to make jurisdictional determinations consistent with the CWA as interpreted by the courts.

EPA and the Corps are developing a strategic approach to increase our ability to make consistent and predictable jurisdictional determinations. In addition to the GAO responses noted earlier, the agencies are pursuing: (1) the

use of District level case studies to further evaluate and clarify standard operating procedures; (2) the development of appropriate policy guidance and training to promote consistency in problem areas; (3) the convening of joint agency field visits to review sites and circumstances that present challenging jurisdictional determinations; (4) the preparation of a program to track consistency across geographic regions and CWA programs; and (5) the conduct of these activities in a manner that makes our practices and progress available to the general public.

### Conclusion

EPA and the Corps remain fully committed to protecting CWA jurisdictional waters, as intended by Congress and expected by the American people. Safeguarding these waters is a critical federal function because it ensures that the physical, chemical, and biological integrity of these waters is maintained and preserved for current use and for future generations.

We agree with the GAO that it is very important to document jurisdictional determinations and ensure such information is publicly available. While the Corps and EPA have determined that we will not pursue rulemaking, we remain committed to the goal of making section 404 jurisdictional decisions consistent, open, predictable, and based on best available science. We believe that the initial steps recommended by the GAO report will assist us to reach our goal, as

well as help the regulated public achieve full compliance with the CWA and increase the effectiveness, efficiency and responsiveness of the CWA section 404 program.

Mr. Chairman, this concludes our testimony. We appreciate your interest in these important national issues, and would be pleased to answer any questions you or the Members of the Subcommittee may have.

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